

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SARA LEE d/b/a INTERNATIONAL BAKING
COMPANY AND EARTHGRAINS

and

Cases 21-CA-36154
21-CA-36155
21-CA-36491

FREIGHT, PARCEL, BAKERY, DAIRY, MEAT,
POULTRY AND FACTORY WORKERS IN THE
LOS ANGELES METROPOLITAN AREA; GENERAL
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS
LOS ANGELES, SAN BERNARDINO, RIVERSIDE
COUNTIES, CALIFORNIA; AGRICULTURAL AND
RELATED PRODUCT WORKERS IN THE CALIFORNIA
COUNTIES OF SAN DIEGO, IMPERIAL, ORANGE,
ALAMEDA, LOS ANGELES, SAN BERNARDINO,
VENTURA, SANTA BARBARA, KERN, SAN LUIS
OBISPO, TULARE, KINGS, MONTEREY, SAN BENITO,
FRESNO AND MERCED, LOCAL 63, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

21-CA-36180

BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS INTERNATIONAL
UNION, LOCAL 37, AFL-CIO, CLC

and

21-CA-36201

MARTIN SANCHEZ

Jean Libby and Irma Hernandez, Attys.,
Counsel for the General Counsel, Region 21,
Los Angeles, California.

Timothy A. Davis and Kimberley F. Seten, Attys.,
Constangy, Brooks & Smith, LLC,
Counsel for Respondent, Kansas City, Missouri.

Amanda Lively, Wohlner, Kaplon, Phillips, Young & Cutler,
Counsel for Charging Party, Teamsters Local 63,
Sherman Oaks, California.

Guadalupe Palma, Atty., Weinberg, Roger & Rosenfeld,
Counsel for Charging Party, Bakery Union Local 37,
Pasadena, California.

Ruben Luna, Organizer, Charging Party,
Teamsters Local 63, Covina, California.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Los Angeles, California on April 4 through 7 and May 23, 2005¹ upon Second Order Consolidating Cases, Amended Consolidated Complaint and Amended Notice of Hearing (the Complaint) issued December 15, 2004 by the Acting Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Wholesale and Retail Food Distribution, Teamsters Local 63 (Teamsters Local 63)², upon a charge filed by Bakery, Confectionery and Tobacco Workers and Grain Millers International Union, Bakery Union Local 37, AFL-CIO, CLC (Bakery Union Local 37), and upon a charge filed by Martin Sanchez (Mr. Sanchez), an individual. The Complaint, as amended, alleges Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains (Respondent) violated Sections 8(a)(1), (3) and (4) of the National Labor Relations Act (the Act).³ Respondent essentially denied all allegations of unlawful conduct.

II. Issues

1. Did Respondent engage in the following independent violations of Section 8(a)(1) of the Act: threaten employees with termination if they selected Teamsters Local 63 as their collective-bargaining representative; threaten employees with job loss if they voted for Teamsters Local 63 and in the event of a strike; threaten employees with unspecified reprisals if they engaged in protected activities; threaten to report employees to the Bureau of Citizenship and Immigration Service (formerly known as Immigration and Naturalization Service) in retaliation for engaging in protected activity; interrogate employees about their union activities; create the impression of surveillance of employees' union activities; threaten an employee with unspecified reprisals for having testified in support of another employee's unemployment insurance claim; and threaten to terminate an employee if he contacted a union representative?
2. Did Respondent violate Section 8(a)(3) and (1) of the Act by suspending and terminating Jose Guadalupe Arteaga on January 12?
3. Did Respondent violate Section 8(a)(1), (3), and (4) of the Act by suspending and terminating Maria Zarco on January 13 and January 22, respectively?
4. Did Respondent violate Section 8(a)(3) and (1) of the Act by suspending and issuing a written warning to Felipe Serrano on January 29?

¹ All dates herein are 2004 unless otherwise specified. The hearing was continued from April 7 to May 23, 2005 to permit Counsel for the General Counsel to procure the testimony of Alberto Salas.

² The full name of Teamsters Local 63 is set forth in the case caption.

³ At the hearing, Counsel for the General Counsel amended the complaint to include the January 29, 2004 suspension of Felipe Serrano as a violation of Section 8(a)(3) and (1) of the Act. Respondent denied the amended allegation.

III. Jurisdiction

Respondent, a Delaware corporation, with a facility located in Vernon, California (the Vernon facility) has at all relevant times been engaged in the manufacture, sale, and distribution of bakery products to commercial customers. During the 12-month period ending September 22, 2003, a representative period, Respondent annually sold and shipped goods valued in excess of \$50,000 directly from its Vernon facility to customers located outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and Teamsters Local 63 and Bakery Union Local 37 have been a labor organizations within the meaning of Section 2(5) of the Act.⁴

IV. Findings of Fact

A. Alleged Independent Violations of Section 8(a)(1) of the Act

Respondent manufactures bakery products at its Vernon facility, where at all times relevant hereto, it employed 18-20 shipping and receiving employees and 11 delivery drivers. In 2002, Bakery Local 37 conducted a representation campaign among Respondent's shipping and receiving employees, culminating in a Board-conducted representation election, which Bakery Union Local 37 lost.⁵ In the spring of 2003, Teamsters Local 63 commenced an organizational campaign among Respondent's drivers at the Vernon facility. Region 21 conducted a representation election among Respondent's drivers on October 16, 2003, which Teamsters Local 63 won by a vote of seven to four. Jose Guadalupe Arteaga (Guadalupe Arteaga or Guadalupe) and Felipe Serrano (Mr. Serrano) actively supported Teamsters Local 63 from nearly the inception of its campaign.

During the course of the campaign, the following exchanges occurred between supervisors and employees of Respondent:

1. Rigoberto Arteaga (aka Arturo Arteaga and herein Arturo Arteaga or Arturo), shipping and receiving supervisor:

According to Guadalupe Arteaga,⁶ in September 2003, Arturo Arteaga asked Guadalupe if he was aware someone wanted to bring in a union and asked if Guadalupe had signed a union card because he knew seven drivers had. When Guadalupe denied signing, Arturo said he had been told one of the cards bore the last name of "Arteaga." Guadalupe said perhaps a temporary driver had used his name.

Two to three days later, Arturo told Guadalupe to tell him if he knew something about the union. Guadalupe denied any knowledge. Arturo said that maybe Guadalupe was even the president. Guadalupe answered that if Arturo continued to say that, he would talk to his supervisors upstairs. Arturo laughed. Thereafter, Arturo often referred to Guadalupe in front of other employees as "the president of the union."

⁴ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

⁵ The Board dismissed in part and sustained in part objections to that election. *Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains*, 342 NLRB No.12 (2004).

⁶ Arturo Arteaga is not related to Guadalupe Arteaga.

On other occasions, Arturo instructed Guadalupe to tell him which employees had “voted” for the union, saying that even if employees had not signed, employees would have to leave.

Arturo Arteaga denied the above accusations. I credit Guadalupe Arteaga’s account. His testimony was clear, consistent, and forthright.⁷

Mr. Sanchez testified that on several occasions prior to the election, Arturo Arteaga asked whom he was going to vote for and told him to be careful about his choice. On the day before the election, Arturo told Mr. Sanchez he knew whom he was going to vote for. On the day of the election, Arturo told Mr. Sanchez not to forget whom he was voting for. Arturo denied having such conversations with Mr. Sanchez. Mr. Sanchez’ pre-complaint affidavit to the Board does not mention any interrogation but states only that Arturo Arteaga told him to “be careful who you vote for.”

Respondent terminated Mr. Sanchez in November 2003. Subsequently, Mr. Sanchez filed an unfair labor practice charge with the Board, which was thereafter dismissed. The potential bias created by this history, coupled with the discrepancies between Mr. Sanchez’ affidavit and his assertions at the hearing, prevent me from crediting his testimony.

2. Sara Dominguez (Ms. Dominguez), Respondent’s Human Resources Supervisor:

According to Guadalupe Arteaga, after Arturo Arteaga first spoke to him, Ms. Dominguez called him to her office and asked if he knew something about the union. When Guadalupe Arteaga denied knowledge, Ms. Dominguez told him he was one of the most senior drivers and made decent money, that the union would harm him, and that it would be better for him not to sign a union card. When Guadalupe Arteaga again denied knowledge, Ms. Dominguez told him to think about it. Ms. Dominguez denied any such conversation but testified, somewhat equivocally, “No, I didn’t ask because I already knew. They just—you couldn’t talk to them. There was no change in their minds. I mean there was no reason to talk to them.” I find Guadalupe Arteaga’s testimony in this regard persuasive, and I credit his account.

3. Manuel Arteaga, Shipping and Receiving Supervisor and brother of Arturo Arteaga:

According to Guadalupe Arteaga, sometime before the election, Manuel Arteaga asked Guadalupe and Mr. Sanchez if they knew which employees had signed union cards. They denied knowledge. Manuel Arteaga said that even if the union won an election, the drivers would leave, as he would hire the Schneider company to do their work.⁸

⁷ I consider few witnesses in this matter to have been fully candid or consistently reliable in all testimony. However, I need not refuse to accept everything a witness says because I do not believe all of it; “nothing is more common in all kinds of judicial decisions than to believe some and not all [that a witness says].” *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev’d. on other grounds, 340 U.S. 474 (1951), cited with approval in *Daikichi Sushi*, 335 NLRB 622 (2001).

⁸ Respondent did, in fact, subcontract its product delivery work sometime after the election. The General Counsel does not allege that the subcontracting violated the Act.

Two to three days later, Manuel Arteaga told Guadalupe that he knew who the leader of the union was. Guadalupe said that if they knew, they should stop calling him the president. Manuel Arteaga said he also knew who had signed cards.

5 At about the same time, Manual Arteaga, referring to the upcoming election, told Mr. Sanchez, "Don't do wrong by us."

Following the election, according to Guadalupe Arteaga, Manuel Arteaga told him he was certain he had voted for the Union. Guadalupe admitted doing so.

10

Manuel Arteaga denied talking to any employee about the union at any time. I did not find his denials convincing, and I do not credit them.

4. Jesse Medina, (Mr. Medina), Logistics Manager:

15

As Respondent correctly points out, there is no complaint allegation that Jesse Medina's conduct violated the Act. Notwithstanding the General Counsel's presumably inadvertent omission, Counsel for the General Counsel presented detailed evidence of Mr. Medina's allegedly unlawful statements, and Respondent called Mr. Medina to rebut the testimony. Therefore, I find the parties fully litigated this issue. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated [citations omitted]." *Atlantic Veal & Lamb, Inc.*, 342 NLRB No. 37, fn. 5 (2004). The issues regarding Mr. Medina's statements are inextricably connected to the timely alleged allegations of the complaint, involve the identical underlying legal theory and factual situation, and are subject to the same employer-raised defenses. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); *Precision Concrete*, 337 NLRB 211 (2001). Accordingly, I have considered whether Mr. Medina's statements violated Section 8(a)(1) of the Act.

20

25

30

According to Guadalupe Arteaga, Mr. Medina asked him if he knew anything about the union because he had a letter saying drivers had signed cards authorizing the union to represent them. Guadalupe denied knowledge. Mr. Medina said the union was not a good thing, and Guadalupe should tell the honest truth if he was involved. Guadalupe again denied involvement. Mr. Medina told Guadalupe that he knew he was comfortable in his job and that he should think about the union, as it was not a good thing.

35

Guadalupe Arteaga also testified that on another occasion as they rode together in a delivery truck, Mr. Medina asked him to report what he knew about the union and whether he was comfortable with his job. Guadalupe complained that Arturo Arteaga pressured him, yelled at him, gave him the worst jobs, called him names (i.e. "La Gorda," meaning the fat lady), and grabbed his private parts. Mr. Medina laughed. Guadalupe said it was not funny and reminded Mr. Medina that he had promised to fix those problems when Guadalupe had formerly complained of them. Mr. Medina said he would try to give Guadalupe a raise.

40

45

Driver Felipe Serrano (Mr. Serrano) testified that in early September, Mr. Medina asked him if he knew who organized the drivers. Mr. Serrano denied knowledge, but thereafter Mr. Medina continued to inquire and asked Mr. Serrano to find out who wanted the Union and who had signed authorization cards, saying he would keep the information confidential.

50

Although Mr. Medina, who no longer worked for Respondent at the time of the hearing, admitted that the topic of the union came up in conversations with employees, he denied telling

any employee that he knew who had signed authorization cards. I find Guadalupe Arteaga and Mr. Serrano's testimony in this regard persuasive, and I credit their accounts.

In September 2003, Mr. Serrano invited two drivers, Alfredo Garcia and Arturo Maravilla (Mr. Maravilla) to attend a union meeting. When the two declined, Mr. Serrano told them it was unfair for them to let union supporters do the work to obtain benefits they would later profit from. According to Mr. Serrano, both he and Mr. Maravilla used strong language but parted without further incident. A few days later, Mr. Medina told Mr. Serrano never to invite Mr. Garcia and Mr. Maravilla to a union meeting, as he could get into trouble if he did.

5. Rick Medina, Safety Director⁹:

In August 2004, Respondent received a customer complaint that one of Respondent's delivery drivers had knocked down a shed at the customer's facility. Upon reviewing the delivery schedule, Mr. Medina and Rick Medina identified the driver as Mr. Serrano. In the course of Respondent's investigation, while enroute to view the subject trailer, Mr. Serrano told Rick Medina he wanted to call his union representative to protest the company's reaching a conclusion without investigation. Mr. Serrano testified that Rick Medina told him if he called the Union, it could be grounds for termination. Fortuitously, Mr. Luna called Mr. Serrano on his cellular telephone at that moment. Mr. Serrano told Mr. Luna about the situation and asked if he wanted to speak to Rick Medina. After Rick Medina accepted the telephone, Mr. Serrano heard him say it was a bad connection and recite his office number. Mr. Serrano and Rick Medina went to the latter's office where Rick Medina accepted a phone call from Mr. Luna. I do not credit Mr. Serrano's testimony that Rick Medina told him calling the Union could be grounds for termination. It is improbable that after having made such a statement, Rick Medina would immediately engage in an apparently amicable conversation with Mr. Serrano's union representative. Moreover, there is no evidence Mr. Serrano told Mr. Luna of the threat, which one would expect had such a threat occurred. Following further investigation of the incident, Respondent issued Mr. Serrano a final warning, which the General Counsel did not allege violated the Act.

6. Irma Elioff:

Following his discharge, Guadalupe Arteaga filed for unemployment benefits with the State of California, Employment Development Department (EDD), which resulted in a hearing on April 5 before Administrative Law Judge, Georgina Torres Rizk of the California Unemployment Insurance Appeals Board (the unemployment hearing). Mr. Serrano, inter alia, testified at the unemployment hearing on behalf of Guadalupe. In the course of cross-examination, Irma Elioff (Ms. Elioff), Respondent's Human Resources Director, asked Mr. Serrano if he was, at the time of his testimony, in "final warning" status. According to Ms. Elioff, she asked the question essentially to show potential bias on Mr. Serrano's part.

7. Respondent's pre-election meetings with drivers:

Prior to the October election, Respondent held three meetings with its drivers regarding the upcoming union vote. Ms. Elioff spoke at the meetings. Also present for Respondent were Arturo Arteaga, Ms. Dominguez, and Mr. Medina.

⁹ Rick Medina is not related to Mr. Medina.

According to employee witnesses, at the first meeting, Ms. Elioﬀ told employees there was nothing good about the Union, that it was losing membership and was always on strike, and that employees would lose if they voted for it, that unions go on strike, and if other companies went on strike, Respondent's drivers would have to join them and could be more easily fired.

5 She told employees that Respondent could make its rules stricter, that if employees were five minutes late, they could receive a warning and on the third tardy, it would be "goodbye." (In this regard, Guadalupe Arteaga understood Ms. Elioﬀ to be speaking of what would occur if employees were in the Union.) Ms. Elioﬀ said medical coverage under a union was no good; the union charged dues and could raise them when employees least expected it. She told

10 employees it was better they not vote, as they would lose seniority and start from zero in bargaining. She said if employees went on strike, the company could subcontract the delivery work, naming the Schneider company as a likely prospect.

Employee witnesses recalled that at the second meeting, Ms. Elioﬀ repeated much of the same information given in the first meeting. She also told employees Respondent was

15 legally obligated only to pay them minimum wage and could subcontract the delivery work to Schneider. Ms. Elioﬀ read aloud from news clippings of strikes in Tennessee where the companies replaced strikers, and workers got fired. Ms. Dominguez described her family's privations and loss of income when her husband's union had gone on strike. Ms. Elioﬀ said that

20 the Union would charge employees \$500 a year, which could otherwise be used to buy food for the family. Respondent showed a video in which a driver told of his father's experiences with a union and advised employees to vote no.

At the third meeting, employee witnesses said, Respondent showed a video and representatives asked employees not to vote for the Union. Ms. Elioﬀ said striking employees would not receive unemployment and could be replaced. All employee witnesses denied that Ms. Elioﬀ had read from anything other than news clippings at the meetings, but I cannot accept their testimony in that regard. In her post-hearing brief, Counsel for the General Counsel concedes that Ms. Elioﬀ "read from prepared scripts." I note that in meetings Respondent

25 conducted with employees during the 2002 union election campaign, Ms. Elioﬀ also read, although not verbatim, from scripts. *International Baking Company and Earthgrains*, supra. The inability of employees who testified about the meetings to recall that Ms. Elioﬀ read from scripts impacts negatively their reliability as witnesses.

Respondent introduced three scripts into evidence. Ms. Elioﬀ, Mr. Medina, and Ms. Dominguez denied that in responses to questions, Ms. Elioﬀ said drivers could lose their jobs or be fired. Ms. Dominguez testified that Ms. Elioﬀ answered a question about drivers' wages up North by saying there were no guarantees, since, with a union, wages and benefits could go up or down, and that during a strike employees could lose benefits because they were not working.

35 After taking into consideration the sketchiness of the various employee accounts and after assessing all testimony for reliability and consistency. I find that Respondent's witnesses, in this regard, testified clearly, unequivocally, and sincerely. I find that Ms. Elioﬀ, for the most part, read to employees from printed scripts, and I credit Respondent witnesses' testimonies of her nonscripted statements. In pertinent part, Ms. Elioﬀ's scripted remarks read as follows:

45 The Teamsters have more strikes each year than any other union in the country. I repeat, the Teamsters have more strikes than any other union in the country. Strikes with the Teamsters can happen two ways. If we don't agree with the Teamsters during negotiations of wages or other things, they can take you all out on strike. This is called a

50 primary strike. Again, given our current financial situation, if the Teamsters win this election, you could find yourself in a position where if we refuse the Teamsters requests during bargaining they could call you out on strike.

....

Always remember, economic strikers don't get paid, don't get benefits, don't get unemployment and can be permanently replaced by other employees or contract drivers.

....

5 If the costs of delivering the products are more than the cost of using an outside transportation company, measures like they took in London [Kentucky] have to be considered. I am not saying that we have a plan in place in our bakery to outsource the driver jobs or that we would outsource the jobs if the Teamsters win the election. I repeat, I am not saying that we have a plan in place in our bakery to outsource the driver jobs or that we would outsource the jobs if the Teamsters win the election. All I am saying is that if production or delivery costs are not in line with earnings all options have to be considered.

15 In her post-hearing brief, Counsel for the General Counsel asserts that Ms. Eliooff "admitted to telling [employees at the meetings] that under a union contract, there would be no flexibility in administering a disciplinary procedure because Respondent would end up with grievances." Presumably, Counsel referred to the following testimony:

20 Q. In [any of these three meetings] did you ever tell employees...that it would be easier to fire them if they voted in a union?

A. No.

25 Q. Did you talk about what would happen to them if they might be five minutes late getting to work?

A. Yes...What I explained to them was unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we might end up with union grievances as a result of it...

30

B. Suspension and Termination of Guadalupe Arteaga

35 By Guadalupe Arteaga's account, in the two years before the union organizational campaign began, Arturo Arteaga, whom he had known for 30 years and whom he considered a friend, engaged in "horseplay" at work by grabbing his buttocks. Guadalupe admitted that although he did not like the horseplay and did not think his supervisor should behave that way, he sometimes jokingly "returned" the conduct after Arturo instigated it or mimicked the conduct because he was angry about it. Guadalupe said he complained about it to Ms. Eliooff, who said she would take care of it but did not.

40

45 One or two days after Respondent held its second union campaign meeting, Guadalupe Arteaga spoke with Oscar Lopez (Mr. Lopez) in Mr. Medina's office. Mr. Lopez, who said he was there from New Mexico to represent the company, told Guadalupe he was not telling employees to vote yes or no, but he reminded Guadalupe of what he had said at the meeting. Guadalupe told Mr. Lopez how Arturo Arteaga treated him: pressuring him, yelling at him, grabbing his private parts in front of others, assigning him the worst jobs, calling him the fat lady, stealing pallets from the company, and selling bread to the lunch truck proprietors. Mr. Lopez said he would report Guadalupe's complaints to management.

50 On January 12, Guadalupe Arteaga unloaded a trailer with Gemaro Bugarin (Mr. Bugarin), Arturo Arteaga's uncle. When the two finished the unloading, Guadalupe asked Mr. Bugarin to move the trailer, as was customary. Arturo intervened and told Guadalupe, "No,

you're going to move it." Guadalupe asked why Arturo's "f____ cousin" did not move it, as he always did. Arturo repeated his order, and Guadalupe agreed, saying he would first visit the restroom. Up to this point, the story is essentially undisputed. Witnesses disagree, however, as to what transpired after Guadalupe returned from the restroom.

5

According to Guadalupe Arteaga, upon his return to the loading area from the restroom, as he passed Arturo Arteaga, Arturo grabbed his testicles very hard from the front, "squeezing like never before." In considerable pain, Guadalupe wordlessly shoved Arturo away from him into some bread trays, ripping his jacket. Guadalupe's testimony at his April 5 unemployment hearing differs somewhat from his hearing testimony. Guadalupe testified in the unemployment forum that on April 5 when he was going toward the office to obtain his paperwork, Arturo Arteaga grabbed him, whereupon Guadalupe "turned around desperately" and in doing so, tore Arturo's jacket. Guadalupe's report to Ms. Zarco of what occurred also differs from his testimony. According to Ms. Zarco, Guadalupe telephoned her at home to ask her to write a letter describing the times she had seen him and Arturo playing around at work. Guadalupe told Ms. Zarco he needed the letter because of something that happened while he and Arturo were playing around. Guadalupe said he had grabbed Arturo from behind, and when Arturo in return had grabbed his genitals, Guadalupe had pushed him into a stack of trays.

10

15

20

Testifying for the General Counsel, Mr. Serrano said that he observed the confrontation as he was walking toward the exit door; he saw Arturo Arteaga grab Guadalupe Arteaga by the "balls," and Guadalupe shove him away by pushing his shoulder, after which Mr. Serrano turned away and left. In testimony given at Guadalupe's April 5 unemployment hearing, Mr. Serrano said that Arturo and Guadalupe "basically [stood] facing each other" when Arturo grabbed Guadalupe's "private parts." Mr. Serrano said he had never before seen Arturo touch any employee, including Guadalupe other than by slapping them on their shoulders or backs. Mr. Serrano's latter testimony is inconsistent with his January 12 written description of the event, which states, in pertinent part:

25

30

I...have been witness and saw Arturo Arteaga...grab and push Jose Guadalupe Arteaga...grabbed him on the bud [sic].¹⁰ It is not the first time that I have seen this before. Last time I seen this was on 1-11-2004.

35

According to Arturo Arteaga, after Guadalupe Arteaga angrily inquired why Arturo Arteaga's "f____ relative" would not move the trailer, he ran toward Arturo, grabbed him by his neck, ripping his jacket, pushed him against the bread racks, and made a motion as if he would hit him.¹¹ Arturo asked what was going on, whether Guadalupe was crazy, and why he had done that to him. Arturo denied grabbing Guadalupe's private parts or fighting him in any way.

40

Respondent called two witnesses, who described what they had seen of the confrontation. William Quevado, shipping and receiving employee, heard Arturo Arteaga tell Guadalupe Arteaga to move a trailer as the two walked in front of him, but he did not hear Guadalupe's response, and he saw no physical contact, being turned away from the two. He did not pay enough attention to notice whether their voices were angry, but he heard cloth rip. Mr. Bugarin testified he went to the restroom immediately after Arturo Arteaga directed Guadalupe Arteaga to move the trailer and neither saw nor heard any further interaction between the two.

45

¹⁰ I take "bud" to be a misspelling of "butt."

50

¹¹ By gesture during his testimony, Arturo Arteaga demonstrated Guadalupe Arteaga's grabbing his jacket by its front neck area.

After their confrontation, Arturo Arteaga left the loading area and immediately telephoned his supervisor, Mr. Medina. He told Mr. Medina that Guadalupe had lunged at him, grabbed him by the throat and pushed him against a rack of bread. He said his neck hurt, and Mr. Medina told him to go to the health clinic and to tell Manuel to tell Guadalupe he was suspended. Arturo then telephoned Ms. Elioff. While this was going on, Guadalupe moved the trailer, reported to the office and obtained his delivery papers from Arturo, who was talking on the telephone, and made his delivery. When Guadalupe Arteaga returned to the Vernon facility, Luis Magana and Manuel Arteaga told him he had to go home and return the next day to talk to Ms. Elioff. According to Guadalupe, he asked for permission to finish his eight hours, to which Manuel Arteaga initially agreed but later refused, saying Respondent would say he was not doing his job properly. Guadalupe said that maybe he was already not doing his job properly because a driver named Bajaro had punched in and then gone to work another job. According to Guadalupe, Manuel Arteaga said that Bajaro was not in the Union.

At some point following the Arturo/Guadalupe incident, Arturo Arteaga met with Ms. Elioff in her office. He told her that William Fierro Quevado, Nicolas Macias, and Mr. Bugarin had been working in the area at the time of the confrontation. He also told Ms. Elioff that although he had telephoned the police, he did not file a report because the police cautioned him that Guadalupe Arteaga could echo his accusation of assault, and the police would have to arrest him as well.

Ms. Elioff spoke to Nicolas Macias, who said that he was standing by the bread trays, that he heard something and noticed the trays move. Then he saw Arturo Arteaga, who showed him his torn jacket. Ms. Elioff also spoke to William Quevado, who said he was counting bread when he heard angry voices and ripping cloth. When he turned toward the sounds, he saw Guadalupe and Arturo Arteaga standing together before walking away in separate directions.¹²

At 11:09 a.m. that same day, Ms. Elioff informed Respondent's head office by email that Guadalupe had "physically assaulted" Arturo, stating inter alia:

My recommendation is immediate discharge. We have a custom and practice as well as a policy that an employee is discharged for [cause] whenever this has happened. We do not have a single employee who has ever gotten into a fight and has been given a warning or suspension. They have always consistently been discharged immediately after an investigation confirms this.

In addition, I would like to point out the written documentation we have given several of these Class A Drivers due to their behavior as a result of them having voted in the union. They have been insubordinate, but we have treaded lightly towards them and merely given them something in writing. In my opinion we cannot afford to deviate from our custom and practice as well as policy of zero tolerance towards violence in the workplace.

When Guadalupe Arteaga went home, he telephoned union representative, Ruben Luna (Mr. Luna). The following day, the two returned to Respondent's facility at 11 a.m. Declining to

¹² In a file memo regarding the incident dated January 12, Ms. Elioff stated that she interviewed Leopoldo Meza as a witness. At the hearing, Ms. Elioff testified that she had inadvertently substituted Leopoldo Meza's name for that of Nicolas Macias. Ms. Elioff did not interview Mr. Bugarin until June.

permit Mr. Luna to participate, Ms. Eloff met with Guadalupe in her office and asked what had happened the day before. According to Guadalupe, he told her that Arturo Arteaga had grabbed his private parts, and he had torn his jacket. Ms. Eloff accused Guadalupe of trying to hit Arturo, saying she had two witnesses but refusing either to name them or let Guadalupe see them. Guadalupe said he had witnesses, too, and asked her to let him confront Arturo, which she refused. Guadalupe told Ms. Eloff that he and Arturo were just playing with each other and that Arturo was in the habit of playing with the employees. According to Ms. Eloff, Guadalupe told her that he and Arturo had been horsing around as usual, but this time Guadalupe had ripped Arturo's jacket accidentally. Ms. Eloff denied that Guadalupe had said anything about Arturo grabbing him, which is inconsistent with her testimony at the April 5 unemployment hearing, where she admitted that Guadalupe Arteaga had told her on January 21 that Arturo Arteaga had grabbed his private parts.

Ms. Eloff sent Guadalupe Arteaga home, saying she would call him later. A few hours later, Ms. Eloff called Guadalupe and told him he was fired.

With the purpose of proving that Arturo Arteaga had a propensity for physical sexual contact with employees, Counsel for the General Counsel presented witnesses to testify about Arturo's inappropriate behavior at work. Corroborated by Maria Zarco (Ms. Zarco), shipping and receiving employee, Guadalupe Arteaga testified that he saw Arturo show obscene photographs including two of Arturo in compromising position with a scantily clad woman to Ms. Zarco and ask her if she would like to be the woman in the photographs.¹³ Guadalupe also testified that Arturo sometimes grabbed his buttocks while telling Ms. Zarco to watch. Ms. Zarco testified that Arturo and Guadalupe played around a lot, grabbing each other's buttocks and genitals and pushing each other.¹⁴ Daily, she saw Arturo touch other drivers' buttocks and genitals. On one occasion, Arturo told her to look inside a trailer where employee, Gustavo Diaz, sporting a bra and thong underwear, submitted to other drivers grabbing his privates.¹⁵ According to Ms. Zarco, beginning in October 2003, Arturo embraced her from behind on two occasions and asked her out, all of which Arturo denied. Ms. Zarco said she complained to Ms. Dominguez that Arturo was bothering her. Ms. Dominguez told Ms. Zarco that if it happened again, she was to tell her. About two weeks later, Ms. Zarco also reported Arturo's behavior to Ms. Eloff. Ms. Eloff said she would take care of it. Both Ms. Dominguez and Ms. Eloff denied receiving any such complaints.

Along these same lines, Driver, Alex Padilla, testified that he had twice seen Arturo Arteaga touch Guadalupe Arteaga's buttocks both before and after the union election.¹⁶ He also testified that in about June 2003, he had seen Arturo grab a female lunch truck proprietor

¹³ Copies of the photographs were put into evidence. Admittedly, the photographs were taken at a party attended by both Guadalupe and Arturo Arteaga. I find it unnecessary to resolve who took the pictures, who kept them, or how they were obtained for submission into evidence.

¹⁴ According to Ms. Zarco's January 14 written description of this physical interaction, "other people that were not drivers would get in the game...[and] none of them would hide when they grabbed each others buttocks and their front part..."

¹⁵ Gustavo Diaz denied that he had ever, willingly or under coercion, worn the described garments at work. He did not seem a likely candidate for vulgar inanity, and I credit his testimony.

¹⁶ In a letter he provided to Guadalupe Arteaga in January, Mr. Padilla described Arturo Arteaga's conduct with Guadalupe Arteaga as mutual joking around, saying, "they always treat each other too informally."

from behind and simulate having sex. Driver Adalid Osorto recalled seeing Arturo Arteaga grab the proprietor's breasts from behind.¹⁷ He also testified that he saw Arturo touch Guadalupe Arteaga's private parts, as well as Mr. Sanchez', and grab Guadalupe from behind, simulating a sex act.¹⁸ Mr. Sanchez testified he saw Arturo inappropriately touch drivers who worked with him, particularly targeting Guadalupe by grabbing his buttocks or touching his anus. Mr. Sanchez agreed that Guadalupe also grabbed Arturo, saying the two "played with each other and also testified that he and other employees played around in the same way. Arturo Arteaga also called Guadalupe Arteaga "La Gorda" (the fat lady). The evidence shows that most employees had used the term as a nickname for Guadalupe for many years; there is no evidence the nickname originated with Arturo.

For his part, Arturo Arteaga denied inappropriately touching Guadalupe Arteaga. Respondent's witnesses, Hector Magana (Mr. Magana), senior shipping and receiving lead, Manuel Arteaga, Mr. Medina, Mr. Bugarin, and Arturo Arteaga's uncle, denied seeing him do so.¹⁹ Although Mr. Medina admitted that Guadalupe complained to him that Arturo yelled at him, he denied that Guadalupe complained of inappropriate touching.

Respondent has a written sexual harassment prevention policy, which is contained within the handbook distributed to all employees and posted by the entrance into the production plant and in the lunchroom. Further, Ms. Eloff conducts yearly training among hourly employees regarding the policy.

C. Warning and Suspension of Felipe Serrano

Mr. Serrano was an active union supporter, serving as the union observer at the union election in October 2003 and as shop steward thereafter.

On January 29, Respondent issued Mr. Serrano a final warning and suspended him for seven days. Respondent's notice of warning read:

A copy of this memo is being given to you for the purpose of clarifying your position with the company based on unacceptable behavior you have exhibited recently, not only with your fellow drivers, but with other company personnel as well.

Previously, you were given a memo dated November 17, 2003 as a direct result of your continued volatile and intimidating behavior while at work. That memo directly referenced your unacceptable, discourteous, and abusive behavior towards a supervisor, which was witnessed by employees...

A second incident involved two fellow drivers. In that situation, you were once again verbally abusive, confrontational, antagonistic, intimidating and very disrespectful according to the information given by these drivers.

¹⁷ Arturo Arteaga denied inappropriate behavior with Anna Doster, proprietor of the lunch truck with whom he was friendly and whom he occasionally hugged. Ms. Doster corroborated his testimony, and I find her credible.

¹⁸ In a letter he provided to Guadalupe Arteaga in January, Mr. Osorto described Arturo Arteaga's conduct with Guadalupe as joking around and "struggling."

¹⁹ Neither Mr. Magana nor Mr. Bugarin's denial is entitled to any weight. The former did not work the same shift as Arturo Arteaga, and the latter admitted, under cross-examination, that Guadalupe and Arturo Arteaga touched and shoved each other, playing around like children.

The most recent incident occurred on January 26, 2004, and involved a warehouseperson in the Shipping & Receiving Department on Monday, January 26th. This display of unacceptable behavior was witnessed by several individuals. Based on the company's investigation of the incident, including witness interviews, it was determined that you were abusive, confrontational and antagonistic towards a fellow employee.

Please be advised, however, that these are not the only cases of unacceptable workplace behavior which you have demonstrated.

Therefore, consistent with the company's Global Business Practices standards regarding abusive and intimidating behavior, and based on the facts summarized above, coupled with our strict policy of zero tolerance towards any acts of violence, you are hereby on notice that any future incident of this nature will result in your immediate discharge from the company.

Lastly, you are being suspended, without pay, for one week starting immediately.

The incidents alluded to in the warning notice refer to the following circumstances:

November 17, 2003: Respondent issued a warning to Mr. Serrano on for making an obscene gesture and derogatory comments to his supervisor, Arturo Arteaga on November 16, 2003. There is no allegation this warning violated the Act.

Incident involving two fellow drivers: This item relates to Mr. Serrano's exchange with Mr. Garcia and Mr. Maravilla, described above. According to Ms. Elioff, the two employees told her that Mr. Serrano had called them idiots for not attending union meetings. When the employees said they were not interested, Mr. Serrano became belligerent and cursed the two, one of whom cursed back.

January 26, 2004: This item stems from a confrontation between Mr. Serrano and Mr. Magana. Mr. Magana testified that sometime around the end of January, shortly after he gave Mr. Serrano a direction to move a trailer, Mr. Serrano approached him in the presence of other employees and told Mr. Magana not to mess with him. When Mr. Magana denied having done so, Mr. Serrano said, "Don't mess with me; you don't know me."

When Mr. Magana wanted to know if Mr. Serrano was threatening him and what he intended to do, Mr. Serrano said, "Keep it up, and you will see; you will regret it." Mr. Magana reported the incident to Mr. Medina and Ms. Elioff. The General Counsel does not allege that Respondent's consequent warning to Mr. Serrano violates the Act.

D. Suspension and Termination of Maria Zarco

Ms. Dominguez worked in Respondent's human resources office beginning in about 1989. Her duties included review of employee work authorization forms, including Employment Authorization Cards (work permits) issued by the U.S. Department of Justice, Immigration and Naturalization Service, some of which required annual renewal.

In 1994, employee Auria Chavez recommended that Ms. Dominguez hire Ms. Zarco, whom she described as her sister, and Respondent did so in October 1994. Then and later,

Ms. Dominguez socialized with Auria Chavez and other employees who described themselves as sisters of Ms. Zarco and nationals of Mexico. Ms. Dominguez, as well as her supervisor, Ms. Elioff, assumed Ms. Zarco was also a Mexican national. Additionally, Ms. Elioff based her belief that Ms. Zarco was from Mexico on her recollection that the group, including Ms. Zarco, had at one time delegated one sister to go to Mexico to care for their ailing mother.

On April 18, 2002, Local 37 petitioned for an election among Respondent's production and maintenance employees at its Vernon facility. Ms. Zarco served as Local 37's observer at the election held July 9 and 10, 2002, which Local 37 lost by a large margin.²⁰ Following the election, Local 37 filed unfair labor practice charges and objections to the election. In August 2003, a hearing was held before an Administrative Law Judge (ALJ) on the charges and objections, at which Ms. Zarco gave extensive testimony.²¹

All of Respondent's alien employees, including Ms. Zarco, were obligated by federal law annually to obtain and provide to Respondent employment authorization documents. Respondent maintained a "tickler" system designed to alert its Human Resource Department to work permit expirations due to occur within 90 days so that the staff could remind employees of their documentation responsibilities. Respondent conducted monthly reviews of the tickler file and gave reminders to employees as indicated.

Copies of work permits bearing Ms. Zarco's picture, name, and signature, for the years 1998-1999, 2000-2001, 2001-2002, and 2003-2004 were received into evidence. Each showed "Country of Birth" as "Guatemala." According to Ms. Dominguez, during her yearly reviews of Ms. Zarco's employment authorization cards, she failed to notice that the cards named Guatemala as Ms. Zarco's country of birth and never asked Ms. Zarco where she had been born. After Respondent reduced Human Resource staffing in 2001 or 2002, Ms. Dominguez' supervisor, Ms. Elioff, began to assist Ms. Dominguez in reviewing employee work permits, as needed.

In January 2004, while performing the monthly tickler file review, Ms. Elioff saw that Ms. Zarco's work permit was due to expire in 90 days. Consistent with Respondent's common practice, Ms. Elioff reviewed Ms. Zarco's permit²² and noticed the country of origin stated thereon was Guatemala. As Ms. Elioff believed Ms. Zarco was from Mexico and not Guatemala, she decided to obtain an explanation.

According to Ms. Zarco, on January 13, the day after Respondent terminated Guadalupe Arteaga, Mr. Magana, in the presence of Manuel Arteaga asked Ms. Zarco what she would say if anyone asked her if Arturo Arteaga played around with the drivers. She answered that it was the truth that Arturo played around with the drivers.²³

²⁰ The facts concerning Local 37's representation efforts and Ms. Zarco's participation therein are set forth in *Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains*, supra.

²¹ On December 3, 2003, the ALJ, who largely discredited Ms. Zarco's testimony, issued his decision, finding Respondent had engaged in certain unlawful and objectionable conduct. By order dated June 25, the Board affirmed the Administrative Law Judge's decision and directed that a second election be held. *Ibid*.

²² Respondent routinely double-checked expiration dates by referring to the work permits consequent to occasional employee defensiveness about the reminders.

²³ Both Mr. Magana and Manuel Arteaga denied this exchange. As Ms. Zarco appeared to testify sincerely and forthrightly about the conversation, I credit her testimony.

The following morning, January 14, Ms. Zarco was called to Ms. Elioﬀ's oﬃce. Ms. Zarco testified that Ms. Elioﬀ told her she was aware Guadalupe Arteaga was asking some employees to write letters supporting his claim that he had problems with Arturo Arteaga. Ms. Zarco said she had not given him any letter but that she was thinking about whether to help him. Ms. Zarco reminded Ms. Elioﬀ that she had complained of Arturo's conduct toward her. Ms. Elioﬀ told Ms. Zarco that was something that had to resolve itself, adding that the people who wanted to help Guadalupe were going to end up in trouble. Ms. Zarco said she had not given Guadalupe any letter. Ms. Elioﬀ said she was just telling her that people who helped him were going to end up in trouble. Ms. Elioﬀ denied having any such conversation regarding Guadalupe Arteaga.

According to Ms. Zarco, Ms. Elioﬀ then changed the subject and told Ms. Zarco that while checking work permits nearing expiration, she had noticed an error on Ms. Zarco's work permit. Pointing to the word "Guatemala" that appeared under "Country of Birth" on Ms. Zarco's work permit, Ms. Elioﬀ said, "There is a mistake—an error in your permit. It says 'Guatemala.'" Ms. Elioﬀ told Ms. Zarco she should go to an attorney and see about fixing the error, giving her a week to do so. Ms. Zarco said she would see an attorney so he/she could check and see what the error was.

Ms. Elioﬀ gave a different version of her and Ms. Zarco's exchange. According to Ms. Elioﬀ, she pointed to the word "Guatemala" on Ms. Zarco's work permit and said, "But we all know you are from Mexico." Ms. Zarco replied that she had "fixed" her papers like a lot of other people have by saying they are from Guatemala.²⁴ Ms. Elioﬀ interrupted Ms. Zarco, saying, "Please don't tell me anything more that is going to make me have to terminate you. I prefer to believe that the INS made a mistake on your work permit and therefore what I am going to need for you to do is go to the INS, let them know that this is an error on your work permit. What they most likely will give you is a letter to bring back to me confirming that they are going to rectify [the error] and I will be able to have you come back to work."

Later that day, Ms. Zarco wrote the letter Guadalupe Arteaga had requested, describing her observations of Arturo Arteaga's conduct with the drivers. Regarding Ms. Elioﬀ, Ms. Zarco wrote:

...And now with the problem that happened with Arturo and J. Guadalupe they threaten to fire me if I say something of what I know. Irma Elioﬀ has threatened me with calling immigration so they can deport me because that has always been the threat and since I told them that I was only going to say the truth and not lies she then told me that she gave me one week to put my documents in order and if not she would have to fire me and call immigration, and the motive was that I did not want to collaborate with her she was also not going to do it with me. She said that J. Guadalupe for having lied with respect to the Union would have to leave and all the people that were on his side. And for me to think about it and I had a week to do so...

The next day, January 15, Ms. Zarco spoke to Alberto Salas (Mr. Salas), an assistant in the oﬃce of Frank Carvajal, an immigration attorney who had previously assisted Ms. Zarco in

²⁴ A consequence of the Nicaraguan Adjustment and Central American Relief Act (NACARA) was that certain Guatemalans, inter alia, were eligible for more favorable immigration treatment than Mexican citizens, which could arguably provide a motive for misrepresenting country of origin.

obtaining her work permit. Ms. Zarco told him of her meeting with Ms. Elioﬀ. Mr. Salas asked what the error was, and Ms. Zarco said it was in the place on the card where “Guatemala” was printed.²⁵ Mr. Salas checked on his computer and said it was no error; the current card read the same as previous cards. Mr. Salas wrote the following letter, which reads, in pertinent part:

We have handled the legalization of Maria Zarco Amaya, a native of Guatemala. It is my understanding that an employer may ask for a valid work permit and verify the permit. *You are free to do so.* I do not understand why anyone would have any doubts about the validity of her work permit. Any other type of inquiry is unusual and probably not allowed by law...Please also read the notice from the BCIS on unfair employment practices on immigration related matters.

On the following Monday afternoon, Ms. Zarco presented the letter to Ms. Elioﬀ, explaining that Mr. Salas said there was no mistake regarding Guatemala. According to Ms. Zarco, Ms. Elioﬀ said she would call immigration and asked if Ms. Zarco would answer their questions. When Ms. Zarco agreed to do so, Ms. Elioﬀ changed her mind. Telephoning Mr. Salas instead, she angrily spoke to him in English, which Ms. Zarco does not understand. At the conclusion of the conversation, Ms. Elioﬀ told Ms. Zarco her attorney was committing fraud by putting Guatemala on her work permit, as she knew Ms. Zarco and her sisters who also worked at the Vernon facility were from Mexico. Ms. Zarco said the employees Ms. Elioﬀ referred to were not her sisters but her cousins, whom she called sisters because they grew up together, and that she, herself, was born in Guatemala.²⁶ She said that if Ms. Elioﬀ had asked where she was from, she would have told her, without wasting her time getting a letter. Ms. Elioﬀ asked why Ms. Zarco had not told her she was from Guatemala. Ms. Zarco told Ms. Elioﬀ she had never asked her and suggested she call immigration. Ms. Elioﬀ said she would call INS the following day.

Ms. Elioﬀ’s version of what transpired between her and Ms. Zarco that day is significantly different. Ms. Elioﬀ said that she told Ms. Zarco the letter from Mr. Salas was not what she needed; rather, she required a letter from the INS stating they would rectify the error on Ms. Zarco’s work permit, which stated she was from Guatemala, to correctly read that she was from Mexico. Ms. Elioﬀ then telephoned Mr. Salas and told him essentially the same thing, after which, utilizing the speaker feature of the telephone while Mr. Salas was still listening, she translated what she had told him to Ms. Zarco. When she had finished, Mr. Salas said, “That is fine,” and they terminated the conversation.

The hearing was continued from April 7 to May 23, 2005 to permit Mr. Salas to testify. Concerning his January 15 conversation with Ms. Elioﬀ, Mr. Salas said he told Ms. Elioﬀ how she could verify the validity of Ms. Zarco’s work permit. Ms. Elioﬀ told him that she did not question the validity of the work permit but said she knew Ms. Zarco was Mexican, not Guatemalan. Mr. Salas told Ms. Elioﬀ that at some point Ms. Zarco had to have presented evidence to INS that she was from Guatemala, which evidence had apparently satisfied INS.

²⁵ Mr. Salas’ testimony in this regard did not corroborate Ms. Zarco’s. Mr. Salas testified that Ms. Zarco told him her supervisor was saying that Ms. Zarco was not Guatemalan.

²⁶ At the hearing, Ms. Zarco denied her country of origin was Mexico. I declined to permit Respondent to adduce additional evidence regarding Ms. Zarco’s origin and her immigration status. The relevant evidence is what Respondent believed regarding Ms. Zarco’s status at the time of her termination and whether it held the belief in good faith or was motivated by considerations unlawful under the Act. Ascertaining Ms. Zarco’s actual status months after her discharge neither establishes Respondent’s motive nor significantly bears on credibility.

He suggested that Ms. Elioff speak to INS if she doubted the veracity of the evidence. He told Ms. Elioff that the company's only legal obligation was to copy Ms. Zarco's work permit and keep it on file, but if she felt the company had to do more, a letter to INS would cover the company's obligations. Ms. Elioff told Mr. Salas that Respondent was going to fire Ms. Zarco for falsifying immigration documents because the company could get into trouble.²⁷

I have carefully considered all relevant testimony in determining whether to accept Ms. Zarco or Ms. Elioff's account of their conversations. Ms. Zarco testified, essentially, that she did not understand Ms. Elioff doubted the accuracy of Ms. Zarco's stated country of origin. Yet, by Ms. Zarco's account, Ms. Elioff specifically pointed to "Guatemala" as being erroneous. Moreover, Mr. Salas testified that Ms. Zarco told him she was having trouble with a supervisor at work who said Ms. Zarco was not Guatemalan. It is not plausible that Ms. Zarco did not comprehend Ms. Elioff's concern, and her implausible testimony on this point reflects poorly on her credibility. Further, Ms. Zarco's written account of her conversation with Ms. Elioff differs significantly from her testimony at the hearing. In her January 14 letter, Ms. Zarco recounted neither Ms. Elioff's statement that she knew employees were writing letters supporting Guadalupe nor her threat that all employees who helped Guadalupe would end up in trouble, both of which details are so noteworthy that it is unlikely Ms. Zarco would have neglected to include them in her letter had the statements been made. Ms. Zarco wrote, essentially, that Respondent had threatened "to fire [her] if [she said] something of what [she] knew," but that is also not consistent with Ms. Zarco's testimony. Given these inconsistencies, I cannot accept Ms. Zarco's testimony of her conversation with Ms. Elioff, and I accept Ms. Elioff's account.

On Thursday, Ms. Elioff telephoned Ms. Zarco and told her the company attorneys had decided she should be fired. According to Ms. Elioff, she told Ms. Zarco that Respondent could not allow her to work knowing that her work permit was not legal. Thereafter, Respondent sent Ms. Zarco a termination notice dated January 22, in which the reason for termination noted, "Voluntary Resignation."²⁸

V. Discussion

A. Independent Violations of Section 8(a)(1) of the Act

1. Legal Principles

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer...to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization, or promise benefit for not doing so, interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB No. 90 (2004); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001).

²⁷ Although Mr. Salas could not, at the hearing, independently recall Ms. Elioff's having made that statement, he confirmed that he had so attested to a Board agent during the investigation stage of this matter and that subsequent illness and medication had affected his recall.

²⁸ Although Respondent contends Ms. Zarco resigned, clearly Respondent terminated her.

The Board has adopted a totality-of-the-circumstances test in determining whether questioning of an employee constitutes unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* Sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board also considers the following criteria called “the Bourne factors:”²⁹

- (1) Background, i.e. history of employer hostility and discrimination.
- (2) Nature of information sought, e.g. on which to base employment action.
- (3) Identity of the questioner, i.e. place in company hierarchy.
- (4) Place and method of interrogation, e.g. casual or formal.
- (5) Truthfulness of the reply.
- (6)

Ultimately, the Board’s task is to “determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the [questioned] employee so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Center*, 330 NLRB 935, 940 (2000). The interrogation occurring herein is evaluated under those standards.

It is unlawful under Section 8(a)(1) of the Act for an employer to create an impression that it is watching or monitoring its employees’ protected union activity, or in other words, to create an impression of surveillance. The underlying premise is that employees should be free to participate in union activity without fearing that members of management are peering over their shoulders, noting who is involved in union activities and to what extent or how. “[T]he test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance.” *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). *St. Thomas Gas*, 336 NLRB 711, 719-720 (2001). It is not necessary that employees attempt to keep their activities secret to create a violation, and it is not necessary that the employer’s words indicate the information has been obtained illegally. *Grouse Mountain Lodge*, at 1322-1323 (2001).

2. Supervisory conduct

A. Arturo Arteaga violated 8(a)(1) of the Act by the following conduct:

1. In September 2003, asking Guadalupe Arteaga if he had signed a union card, saying he knew seven drivers had and that he had been told one of the signators was named “Arteaga.” Arturo’s statements constituted unlawful interrogation and unlawfully created the impression of surveillance.
2. On later occasions, by directing Guadalupe Arteaga to tell him if he knew anything about the Union and to tell him which employees had “voted” for the Union, engaging in unlawful interrogation and unlawfully requesting employees to report to Respondent the union activities of other employees. *Armstrong Machine Company, Inc.*, 343 NLRB No. 122, slip op. 2 (2004); *Fixtures Mfg. Corp.*, 332 NLRB 565 (2000).

²⁹ First set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

3. Telling Guadalupe Arteaga that even if employees had not “signed,” they would have to leave, thereby threatening reprisals for union activity.³⁰

B. Sara Dominguez violated 8(a)(1) of the Act by the following conduct:

1. Prior to the October election, asking Guadalupe Arteaga if he knew something about the Union, which constituted unlawful interrogation.
2. Impliedly threatening Guadalupe Arteaga with unspecified reprisals by conjoining a comment on his seniority and his “decent” pay rate with an admonition that the Union would harm him and that it would be better for him not to sign a union card. It is reasonable to conclude that Ms. Dominguez’ statement must have conveyed a message that union support would negatively impact Guadalupe’s seniority and pay level. See *Reno Hilton*, 319 NLRB 1154, 1155 (1995). Ms. Dominguez gave Guadalupe no explanation as to how supporting the Union might harm him, leaving him to infer that the harm might arise from subjective factors within Respondent’s control.

C. Manuel Arteaga violated 8(a)(1) of the Act by the following conduct:

1. Prior to the October election, asking Guadalupe Arteaga and Mr. Sanchez if they knew which employees had signed union cards.
2. Informing the two employees that Respondent would outsource their work. Although Respondent’s later outsourcing of its delivery work may have been lawful, Manuel Arteaga’s suggestion to employees that it was linked to their union activities is coercive even if his statement were untrue. Moreover, the statement evidences Respondent’s hostility toward employees’ union activities. *Paragon Pattern & Manufacturing Co., Inc.*, 342 NLRB No. 17 (2004).
3. Telling Guadalupe that he knew who the union leader and the card signers were created an impression of surveillance.
4. Admonishing Mr. Sanchez not to “do wrong by us,” in the upcoming election unlawfully equated loyalty to the company with opposition to the Union. The clear suggestion that voting for the Union would “wrong” Respondent is coercive and violates Section 8(a)(1) of the Act.
5. Following the election, telling Guadalupe he knew how he voted created an impression of surveillance.

D. Jesse Medina violated 8(a)(1) of the Act by the following conduct:

1. On various occasions, set forth above, asking Guadalupe Arteaga if he knew anything about the Union and adjuring him to tell the truth about any involvement, all of which constitutes unlawful interrogation.
2. Telling Guadalupe that he knew he was comfortable in his job and that he should think about the Union, as it was not a good thing. By linking Guadalupe’s current job comfort with abstention from union adherence, Mr. Medina impliedly threatened Guadalupe with unspecified reprisals, as the reasonable inference to be drawn from his statement was that union support would disturb Guadalupe’s contentment.

³⁰ Counsel for the General Counsel argues that Arturo Arteaga also interrogated Mr. Sanchez. I have not accepted Mr. Sanchez’ testimony to that effect. I have found only that Arturo Arteaga told Mr. Sanchez to be careful whom he voted for. Such an admonition, without any accompanying intimation of harmful consequences, is not coercive.

3. On various occasions, asking Mr. Serrano who organized the drivers and soliciting him to find out who wanted the Union and who had signed authorization cards, all of which constitutes unlawful interrogation.
4. Prior to the election, telling Mr. Serrano not to invite other employees to a union meeting, under penalty of adverse consequences, thus interfering with Mr. Serrano's Section 7 rights.

E. Irma Elioff did not violate the Act by her cross-examination of Mr. Serrano at the unemployment hearing:

Counsel for the General Counsel argues that a cross-examination question posed by Ms. Elioff to Mr. Serrano during the course of Guadalupe Arteaga's unemployment hearing constituted a threat of unspecified reprisals against Mr. Serrano for having testified in support of another employee's unemployment insurance claim. Ms. Elioff asked Mr. Serrano if he was, at that time, in "final warning" status, which he was. While such a question could be viewed as a reminder to Mr. Serrano that he was on shaky disciplinary ground with Respondent and had better mind how he testified, Ms. Elioff asserts that her intent in asking the question was solely to bring to the unemployment ALJ's attention the fact that Mr. Serrano arguably had reason to be disgruntled with Respondent. There is no evidence Respondent otherwise threatened or coerced any employee in connection with his/her testimony at the unemployment hearing, and there is no evidence to justify ascribing to Ms. Elioff any improper motivation in raising a legitimate credibility issue in that forum. Accordingly, I conclude the General Counsel has not proved Ms. Elioff engaged in 8(a)(1) conduct in this instance, and I shall dismiss this allegation of the complaint.

F. Statements made in Respondent's pre-election meetings with drivers

In examining union campaign statements made by an employer to its employees, neither the subjective reactions of employees nor the intent of the speaker are determinative in finding 8(a)(1) violations. *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999); *Swift Textiles*, 242 NLRB 691, fn. 2 (1979). Rather, "the issue is whether objectively...remarks reasonably tended to interfere with the employee's right to engage in [a] protected act." *Southdown Care Center*, 308 NLRB 225, 227 (1992). As noted above, I have credited the testimony of Ms. Elioff, Mr. Medina, and Ms. Dominguez regarding what was said at employee meetings. The General Counsel asserts that even disregarding employee testimony, Respondent's evidence proves that Respondent unlawfully conveyed to its drivers the message that, "one way or another, either by strikes, the collective-bargaining agreement or by subcontracting, employees would lose their jobs if the Teamsters Union won the election." Counsel for the General Counsel's censure of Ms. Elioff's pre-election statements is three-pronged: (1) the statements threatened the likelihood of future union-called strikes and concomitant job loss if employees selected the Union; (2) the statements threatened outsourcing of product delivery if employees selected the Union; (3) the statements threatened adherence to an inflexibly punitive disciplinary system upon negotiation of a union contract.

As for Ms. Elioff's statements concerning strikes, the script shows she accused the Teamsters of striking more frequently than any other union in the country and explained that strikes can occur when a company and a union do not agree to contract terms during negotiations. Ms. Elioff did not imply the company would not conduct contract negotiations in good faith or that the union would have to strike to gain reasonable demands, or that union representation would inevitably lead to strikes and job loss. Rather, it appears that Ms. Elioff accurately outlined what may occur when an employer and a union reach valid impasse during bargaining. The Board has approved campaign language that discusses the economic realities

of the bargaining process. *J.R. Wood, Inc.*, 228 NLRB 593, 593-594 (1977). Applying the Board's *Southdown* standard to her remarks, I cannot find that Ms. Elioﬀ's description of strike potential or consequences unlawfully interfered with employees' Section 7 rights.

5 A threat to outsource or subcontract work because employees elect to be represented by a union is unlawful. *MPG Transport, Ltd.*, 315 NLRB 489, fn. 1 (1994). As for Ms. Elioﬀ's statement concerning delivery outsourcing, she neither threatened that Respondent would predicate outsourcing on employees' representational decision nor suggested that outsourcing would be accomplished without reference to any elected representative. She merely notified the
10 drivers that Respondent would consider the costs of in-house versus subcontracted delivery and that delivery as well as production costs had to correlate to earnings, a fundamental facet of entrepreneurial planning, which could not reasonably have surprised or alarmed employees. I do not find Respondent's stated intention to consider lawful economic strategies in operating its business violated Section 8(a)(1) of the Act.

15 Finally, Ms. Elioﬀ told employees, essentially, that if a future union contract contained a disciplinary procedure, Respondent would have to adhere to it even for such minutiae as reporting for work five minutes late. Viewed objectively, this statement carries with it both an implied promise (continuation of the current, presumably flexible, disciplinary approach if the
20 drivers rejected the Union) and an implied threat (conformity to strict disciplinary procedures if the drivers chose union representation). I find, therefore, that Ms. Elioﬀ's statement regarding the potential impact of a contractual disciplinary procedure violated Section 8(a)(1) of the Act.

B. Suspension and Termination of Guadalupe Arteaga

25 Respondent's motivation in suspending and terminating Guadalupe Arteaga on January 12 and 13, respectively, is in dispute. In resolving that issue, the Board's analytical guidelines in *Wright Line*,³¹ control. If the General Counsel's evidence supports a reasonable inference that union activity was a catalyzing factor in Respondent's suspension and
30 subsequent discharge of Guadalupe Arteaga, he has made a prima facie showing of unlawful conduct. "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee
35 suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Company*, 338 NLRB 644, 645 (2002). If the General Counsel establishes these four elements, the burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it
40 would have made the same decision, even in the absence of protected activity.³² *Avondale Industries, Inc.*, 329 NLRB 1064 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995).

45 The evidence herein clearly establishes that Guadalupe Arteaga was an active union supporter. As evidenced by the supervisory violations of 8(a)(1) detailed above, Respondent bore animosity toward its drivers' union activities. Through interrogation, Respondent's

³¹ 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1st Cir. 1981), cert. Denied 455 U.S. 989 (1982).

³² A "preponderance" of evidence means that the proffered evidence must be sufficient to
50 permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

supervisors made repeated efforts to ascertain the identities of the union proponents among the drivers. By creating the impression of surveillance and by making veiled threats of reprisal, Respondent's supervisors also tried to quell union support. Following the election, Respondent learned that Guadalupe Arteaga had, indeed, voted for the Union when he admitted as much to

5 Manuel Arteaga, fellow supervisor of and cousin to Arturo Arteaga. Moreover, Guadalupe Arteaga professed to have done so in hope of obtaining better treatment from Arturo Arteaga, whose later complaint formed the basis for both suspension and discharge. It is reasonable to infer that Arturo Arteaga might bear particular animosity toward Guadalupe Arteaga who had, prior to the election, consistently denied union participation in response to Arturo's questions.

10 In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to suspend and terminate Guadalupe Arteaga. *American Gardens Management Company*, supra.³³ The burden of proof therefore shifts to Respondent to show that Guadalupe Arteaga's termination would have (not just could have) occurred even in the absence of his

15 union support. *Avondale Industries, Inc.*, supra at 1066.

In assessing Respondent's evidence of lawful purpose in suspending and terminating Guadalupe Arteaga, I recognize the fact that an employer's desire to retaliate against an employee or to curtail protest does not, of itself, establish the illegality of a termination. If an

20 employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, supra; *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). The correlative canon, of course, is that if an employer's motive is unlawful, it is immaterial that a legitimate reason for dismissal may exist.

25 *E&L Transport Co.*, 331 NLRB 640 (2000). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171 fn. 6 (2000) and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. *Ibid*.

Two questions must be answered to permit an informed determination of Respondent's motivation: (1) Did Arturo Arteaga truthfully report the facts of his January 12 confrontation with Guadalupe Arteaga to upper management; and, as a corollary question, if not, did he misreport the incident because of his animosity toward Guadalupe's union activities?³⁴ (2) Even assuming

35 Arturo accurately recounted to management what had occurred between him and Guadalupe, did Respondent suspend and terminate Guadalupe because he assaulted Arturo or because he had supported the Union in its recent and successful representation bid?

In considering whether Arturo Arteaga accurately reported his January 12 confrontation with Guadalupe Arteaga, I have carefully examined all accounts of the incident. I note that Arturo has consistently held to his version of what occurred, while Guadalupe has given

³³ I do not agree with the General Counsel that Ms. Elioff's January 12 email to headquarters evidenced animus. Ms. Elioff referred to having "treaded lightly" in cases of driver insubordination that had resulted from their "having voted in the union." It does not follow that because Respondent may, accurately or inaccurately, have perceived negative post-election alteration in some employees' behavior, it therefore bears animosity toward union activity.

³⁴ In the latter situation, even if Respondent relied in good faith upon Arturo Arteaga's report, Guadalupe Arteaga's discipline would violate the Act, as Respondent is bound by the acts of its supervisor, e.g., falsely accusing an employee of misconduct in retaliation for his union activities. *Dobbs International Services, Inc.*, 335 NLRB 972, 973 (2001).

inconsistent accounts. Thus, Guadalupe testified that he did not attack Arturo but only reacted to Arturo's vicious and unprovoked frontal assault on his testicles; yet his unemployment testimony suggests that Arturo assaulted him from behind whereupon he "turned around desperately," and he told both Ms. Eloff and Ms. Zarco that he and Arturo were playing around at work, adding to Ms. Zarco that he initiated first contact by grabbing Arturo from behind. Guadalupe's corroborating witness, Mr. Serrano, also gave inconsistent reports: at the hearing, Mr. Serrano said he saw Arturo grab Guadalupe by the "balls, which was essentially consistent with his testimony at Guadalupe's unemployment hearing, but in a contemporaneous written account, he wrote that he saw Arturo grab Guadalupe on the butt. Moreover, Mr. Serrano's unemployment testimony of Arturo and Guadalupe facing each other at the time of Arturo's attack did not agree with Guadalupe's instant testimony that Arturo was at his side when he assaulted him. Given the vacillatory testimony of the General Counsel's witnesses regarding the January 12 confrontation between Arturo and Guadalupe Arteaga, I cannot accept their accounts. Accordingly, I give weight to Arturo Arteaga's testimony of what occurred. Since I find that Arturo Arteaga did not attack Guadalupe Arteaga, it is unnecessary for me to consider those cases in which the Board and the courts reject misconduct defenses where the employer provokes an employee to the point where he commits an indiscretion and then relies on his conduct to terminate him. See, e.g., *NLRB v. M&B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). In light of this finding, I also find it unnecessary to determine whether Arturo had a proclivity for unseemly sexual interaction with others.

My conclusion that Arturo Arteaga did not attack Guadalupe Arteaga does not end the matter, however; it still must be determined whether Respondent actually suspended and terminated Guadalupe because he assaulted Arturo, or whether animus toward Guadalupe's union activities motivated Respondent to seize upon the incident to rid itself of a union supporter.

Direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corporation of America*, 337 NLRB 99 (2001); *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,³⁵ abruptness of the adverse action,³⁶ timing,³⁷ failure to conduct a full and fair investigation,³⁸ disparate treatment,³⁹ and/or departure from past practice.⁴⁰ There is no overt evidence of union animus directed specifically toward Guadalupe Arteaga, but circumstances, as described above, exist from which it is reasonable to infer animus. However, no suspicious timing exists herein. Guadalupe's union activity attracted supervisory attention prior to the October 2003 election, but there is no clear evidence that Respondent continued its antiunion conduct thereafter. While Respondent's action in suspending and terminating Guadalupe was certainly abrupt, the immediacy of it is reasonably explained as a justifiable reaction to an employee's assault on his supervisor. Further, there is no evidence of disparate treatment or departure from past practice. Respondent has, at all relevant time, had a zero-tolerance-for-violence policy, and there is no evidence Respondent disregarded or minimized that policy.

³⁵ *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

³⁶ *Dynabil Industries, Inc.*, 330 NLRB 360 (1999).

³⁷ *McClendon Electrical Services, Inc.*, 340 NLRB No. 73, FN 6 (2003); *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 (2000).

³⁸ *Bonanza Aluminum Corp.*, 300 NLRB 585 (1990).

³⁹ *In re NACCO*, 331 NLRB 1245 (2000).

⁴⁰ *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

Counsel for the General Counsel argues that Respondent evidenced discriminatory motivation by conducting a cursory investigation of Arturo and Guadalupe's confrontation. While Ms. Eloff did not interview every potential witness, there is no evidence Respondent sought to shape or distort its inquiry or engaged in sham fact gathering. And while it is also true Ms. Eloff refused to identify Respondent's witnesses for Guadalupe or to let him confront Arturo, "...it is not the province of the Board to assure that employees can confront their accusers. An employer's failure to accord an employee this asserted 'right' does not establish a discriminatory motive." *Chartwells Compass Group, USA, Inc.*, 342 NLRB No. 121 (2004). Respondent provided Guadalupe reasonable information regarding the nature of his misconduct, and, although interviewing the subject employee is not a requirement for an adequate investigation,⁴¹ gave him an opportunity to tell his side of the story. Counsel for the General Counsel also asserts that Ms. Eloff's refusal to permit Guadalupe to have union representation during her interview with him is evidence of "profound hostility to the Union campaign." Respondent had no legal obligation to admit a union representative into the interview, and I cannot infer animus from Ms. Eloff's declining to do so.

Counsel for the General Counsel further contends that Ms. Eloff's January 12 email to headquarters showed a close-minded determination to terminate Guadalupe Arteaga regardless of what any investigation showed, which obduracy reveals unlawful motivation. However, Ms. Eloff prepared the email after having spoken to Arturo Arteaga and another employee about the incident. From their accounts, she had initial knowledge of what had occurred, and no valid reason has been shown why Ms. Eloff should not have believed Arturo's account. See, *American Thread Co.*, 270 NLRB 526 (1984). She was, therefore, entitled to give a preliminary recommendation as to disciplinary disposition of the matter. In short, neither Respondent's investigation of Guadalupe Arteaga's behavior nor its consequent termination proceeding evidences animus.

Finally, Counsel for the General Counsel argues that discharge is an extreme penalty, which should not be applied to an otherwise exemplary employee. However, Respondent's action is not disproportionate to the offense even for a commendable worker. The Board has recognized that changes in the workplace environment require serious employer attention to potential workplace violence,⁴² and Guadalupe Arteaga's discharge for violence toward his supervisor is neither unreasonable nor contrived. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Accordingly, I find Respondent met its burden of showing Guadalupe Arteaga's discharge would have occurred even in the absence of his union activities. Respondent did not, therefore, violate Section 8(a)(3) and (1) of the Act by discharging Guadalupe Arteaga.

C. Warning and Suspension of Felipe Serrano

Mr. Serrano was a high profile union supporter, serving as union observer at the October 2003 union election and as shop steward thereafter. The General Counsel contends that Respondent's January 29 warning to Mr. Serrano and his consequent seven-day suspension were motivated by its animus toward his union activities. The Board's analytical guidelines in *Wright Line*, supra, control. As explained in detail above, if the General Counsel's evidence supports a reasonable inference that union activity was a catalyzing factor in Respondent's warning and suspension of Mr. Serrano, he has

⁴¹ *Frierson Building Supply Co.*, 328 NLRB 1023 (1999).

⁴² *IBM Corporation*, 341 NLRB No. 148, slip op. 3 (2004).

made a prima facie showing of unlawful conduct. The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of protected activity.

5 With regard to the discipline given Mr. Serrano, it is undisputed that the General Counsel has established the first three of four elements the Board set forth in *American Gardens Management Company*, supra: the General Counsel has shown that Mr. Serrano engaged in protected activity; the General Counsel has proved that Respondent was aware of Mr. Serrano's protected activity, and the General Counsel has shown Mr. Serrano suffered an adverse employment action. Respondent contends, however, that the General Counsel has not met the fourth element, i.e., establishing a motivational link, or nexus, between Mr. Serrano's protected activity and the discipline given him.

15 With regard to the fourth element, it is clear from Mr. Serrano's warning notice that Respondent based Mr. Serrano's discipline, at least in part, on certain of Mr. Serrano's union-related activity. The warning notice cites as one item of unacceptable workplace behavior the following:

20 A second incident involved two fellow drivers. In that situation, you were once again verbally abusive, confrontational, antagonistic, intimidating and very disrespectful according to the information given by these drivers.

25 This incident referred to Mr. Serrano's September 2003 exchange with two other drivers in which he criticized their refusal of his invitation to attend a union meeting, perhaps disparaged their intelligence, and traded profanities with one of them. Respondent contends that Mr. Serrano's behavior to the two employees lost him the protection of the Act that he would otherwise have enjoyed in soliciting employees to participate in union meetings. The Board has stated that verbal abuse and profane language are not "an inherent part of Section 7 activity. [Citation omitted]." *Lutheran Heritage Village*, 343 NLRB No. 75 (2004). The Board also recognizes that an employer may prohibit "abusive or threatening language" in a desire to maintain order and avoid liability for workplace harassment. An employer may not, however, exercise valid prohibitions so as to prohibit activity protected by Section 7. *Ibid*. The question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case. See *Atlantic Steel*, 245 NLRB 814, 816 (1979) (employee's use of abusive language may be unprotected depending on circumstances of case including nature of outburst); *Key Food*, 336 NLRB 111 (2001) (employee's profane and abusive tirade not so unreasonable in relation to the employer's provocation as to justify discharge); *Chartwells Compass Group, USA, Inc.*, supra (employer may not lawfully discipline an employee for making pronoun statements that merely make another employee feel uncomfortable.)

45 The pertinent question here is whether Mr. Serrano's September 2003 conduct was so egregious as to forfeit the protection of the Act. I find it was not. Mr. Serrano merely, and protectedly, invited coworkers to attend a union meeting. When they declined, his animadversion on their characters was neither extensive nor threatening. Although Mr. Serrano used profanity, as did one of the invitees, record evidence suggests the use of profane language among Respondent's drivers was commonplace and thus neither intrinsically intimidating nor opprobrious. See *Lutheran Heritage*

50

Village, supra, fn. 7. While duplicative solicitations of unwilling coworkers might have constituted harassment,⁴³ Mr. Serrano did not persist in his invitation to the two employees or even repeat it. Accordingly, I find that Mr. Serrano's September 2003 conduct was protected, that Respondent's inclusion of that conduct in his warning notice violated Section 8(a)(1) of the Act,⁴⁴ and that the General Counsel has made a prima facie showing that Respondent violated the Act by warning and suspending Mr. Serrano on January 29. The burden of proof thus shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have imposed the same discipline without relying on the September 2003 incident.

Even excluding the September 2003 incident, Mr. Serrano's January 29 warning and suspension relied on cumulative misconduct, including a previous warning issued November 17, 2003 for "discourteous and abusive behavior towards a supervisor," and "abusive, confrontational and antagonistic" behavior toward leadman, Mr. Magana, on January 26. The General Counsel does not contend that the November 2003 warning notice violated the Act. As for the latter incident, the specifics of Mr. Serrano's January 26 confrontation with Mr. Magana are that he threatened Mr. Magana with implicit violence in front of other employees in response to what Mr. Serrano perceived as Mr. Magana's disrespectful finger-snapping manner of assigning him a task. The General Counsel does not contend, and I cannot find, that Mr. Magana's direction to Mr. Serrano was given so insultingly and provocatively as to justify Mr. Serrano's response. See, e.g., *NLRB v. M&B Headwear Co.*, supra. Therefore, it is undisputed that Mr. Serrano engaged in misconduct on both occasions. Respondent argues that it would have issued Mr. Serrano the warning and suspension based solely on his November 2003 and January 26 misconduct, as both related to disrespect for and an undermining of Respondent's authority in directing its employees.

As noted above, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, supra, and cases cited therein. While trivial and insubstantial misconduct resulting in discharge may raise a "strong inference of retaliatory motive,"⁴⁵ Mr. Serrano's November 2003 and January 26 conduct cannot be considered either trivial or insubstantial. Each incident showed significant disrespect for employer authority, the latter involving potential workplace violence, a legitimate employer concern,⁴⁶ minimalization of which could result in calamitous consequences. Given the undisputed evidence that Mr. Serrano committed serious and similar infractions within a two-month period, I find no basis on which to conclude Respondent would not have discharged him for those two infractions alone. See *Amber Foods, Inc.* 338 NLRB 712, 717, fn. 16 (2002). Accordingly, I find Respondent met its burden of showing Mr. Serrano's discharge would have occurred even in the absence of his union activities and even in the absence of its unlawful inclusion of the September 2003 incident in his warning notice. Respondent did not, therefore, violate Section 8(a)(3) of the Act by discharging Felipe Serrano.

⁴³ See *Lutheran Heritage Village*, supra, fn. 13.

⁴⁴ Although the General Counsel did not specifically allege the inclusion of this incident in Mr. Serrano's warning notice as an independent violation of the Act, the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Atlantic Veal & Lamb, Inc.*, supra.

⁴⁵ *Ibid* at 1171

⁴⁶ *IBM Corporation*, supra.

D. Suspension and Termination of Maria Zarco

The General Counsel contends that Respondent, on January 13 and 22 respectively, suspended and terminated Ms. Zarco in violation of Section 8(a)(4) of the Act because she testified at a hearing before the Board. Section 8(a)(4) makes it unlawful to discharge or otherwise discriminate against an employee because she has filed charges or given testimony at a Board proceeding. A *Wright Line* analysis applies in 8(a)(4) cases. *American Gardens Management Co.*, supra at 645.

To reiterate, under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action, and finally the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, Ibid. Once the General Counsel has made the showings required above, the burden shifts to the Respondent to prove that it would have discharged the employee even in the absence of the protected conduct.

In August 2003, Ms. Zarco testified extensively at an unfair labor practice and objections hearing arising from Local 37's 2002 representation campaign and election among Respondent's production and maintenance employees.⁴⁷ Ms. Zarco was unquestionably engaged in activity protected by the Act when she testified, which establishes the first element of the *Wright Line* analysis. Respondent was well aware of Ms. Zarco's protected participation in the Board hearing, and that, coupled with Respondent's January suspension and discharge of Ms. Zarco, answers *Wright Line*'s knowledge and adverse employment-action elements. Thus, the General Counsel has met the first three elements of the *Wright Line* burden. However, the evidence herein does not so easily satisfy *Wright Line*'s fourth element, i.e. that "the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action." *American Gardens Management Co.*, Ibid.

There is no evidence any supervisor or agent of Respondent ever expressed animosity toward Ms. Zarco for her August 2003 testimony against the company.⁴⁸ On January 13, the day following Guadalupe Arteaga's discharge, Mr. Magana, in the presence of supervisor Manuel Arteaga, essentially questioned Ms. Zarco as to whether she would rally to Guadalupe's support.⁴⁹ It is reasonable to infer that Mr. Magana and Manuel Arteaga had Ms. Zarco's past willingness to testify against Respondent in mind when they sought to ascertain if she intended to support Guadalupe in his expected protest against his discharge, but there is nothing to suggest Respondent wished to retaliate against Ms. Zarco because of her past testimony. Moreover, while the questioning might arguably permit an inference of animus toward Ms. Zarco's potential support of another employee in a dispute over his discharge, it cannot support an inference of animus toward Ms. Zarco's past Board testimony. Accordingly, I find the

⁴⁷ The Administrative Law Judge's decision issued on December 2, 2003, generally discrediting Ms. Zarco's testimony, but finding Respondent had violated Sections 8(a)(1) and (3) of the Act and had engaged in objectionable conduct, requiring a new election.

⁴⁸ Although Counsel for the General Counsel presented some testimony that Respondent imposed more onerous work duties and conditions on Ms. Zarco after the 2003 hearing, the evidence was not well developed, and I cannot draw any inferences of animus from it.

⁴⁹ Manuel Arteaga's silence during this exchange constitutes supervisory acquiescence in the questioning, which is thus chargeable to Respondent.

General Counsel failed to meet his *Wright Line* burden of establishing a prima facie case that Respondent violated Section 8(a)(4) by suspending and terminating Ms. Zarco because she testified at a Board hearing.

My finding that the General Counsel has not made a prima facie case of 8(a)(4) does not dispose of the allegations concerning Ms. Zarco's suspension and discharge. The following questions remain: (1) Did Ms. Zarco's action in preparing a letter for Guadalupe Arteaga regarding Arturo Arteaga's conduct constitute concerted, protected activity within the meaning of Section 8(a)(1) of the Act? (2) If so, did Respondent suspend and terminate her because she did so?⁵⁰

The Board has enunciated its "longstanding distinction" between concerted activity and mutual aid or protection, both of which tests must be met in establishing Section 7 coverage. *Holling Press, Inc.*, 343 NLRB No. 45 at slip op. 2 (2004). In *Holling Press*, an employee of the company filed a claim of sexual harassment against her supervisor, then appealed to coworkers to give supportive evidence, for which she was fired. In dismissing the complaint, the Board concluded the employee's efforts to garner support, while concerted, were made only to advance her personal issue. The Board stated that the element of concertedness

[i]nclude[s] 'circumstances in which individual employees seek to initiate or to induce or to prepare for group action, [citing *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3rd Cir. 1964)]'...and 'activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,' so long as what is being articulated goes beyond mere griping. [Citing *Meyers Industries*, 281 NLRB 882 (1986)]

The "mutual aid or protection" element, however, requires that the activity engaged in "benefit the group," [not] advance [an employee's] personal case...[and is shown when] the group of employees ha[ve] a common interest in the subject matter." *Holling Press, Inc.*, at slip op. 3.

Applying *Holling Press*, it is clear Guadalupe Arteaga was engaged in activity, which, though "concerted," did not constitute "mutual aid or protection" when he solicited coworker statements in an effort to bolster his unlawful discharge claim. But it is not Guadalupe's activity that is at issue but Ms. Zarco's, and *Holling Press* does not answer the question of whether employees who support another employee in an employment dispute are thereby engaged in concerted activity for mutual aid or protection. The Board has, however, had occasion to rule on analogous activity. In *Cadbury Beverages, Inc.*⁵¹ one employee cautioned another against representation by an assertedly untrustworthy individual. The Board concluded that the employee's caution constituted protected concerted activities on behalf of another employee, and the employer violated Sec. 8(a)(1) of the Act by suspending him because of it. Extending *Cadbury* to Ms. Zarco's situation, I find that when she wrote a supportive letter for Guadalupe Arteaga, she engaged in concerted activity in aid and protection of a fellow employee, thus

⁵⁰ Although the General Counsel did not allege Ms. Zarco's suspension and termination independently violated Section 8(a)(1) of the Act, the employment actions were fully litigated, and Respondent would clearly have presented the same defense to an 8(a)(1) theory of violation as it did to the 8(a)(4) allegation. Accordingly, it is appropriate to consider whether Ms. Zarco's suspension and termination independently violated 8(a)(1) of the Act. *MEMC Electronic materials, Inc.*, 342 NLRB No. 119, at slip op. 7 (2004).

⁵¹ 324 NLRB 1213 (1997), enf'd. 333 U.S. App. D.C. 94 (D.C. Cir. 1998).

meeting both requirements of Section 7 coverage. Adverse employment action taken to quell or to interfere with her protected activity would constitute a violation of Section 8(a)(1) of the Act.

Having determined that Ms. Zarco's action in preparing a letter for Guadalupe Arteaga regarding his supervisor's conduct constituted concerted, protected activity within the meaning of Section 8(a)(1) of the Act, it remains to determine whether Respondent suspended and terminated Ms. Zarco because she engaged in the concerted, protected activity.

Respondent contends it did not terminate Ms. Zarco because of any protected activity. Rather, Respondent argues, it did so in compliance with the requirements of the Immigration Reform and Control Act of 1986 (IRCA), upon suspecting, in good faith, that Ms. Zarco's work permit was based on false information.

IRCA's prohibitions have been enunciated by the Supreme Court:

[I]f an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, 1324a(e)(4)(A), and may be subject to criminal prosecution, 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b).⁵²

Clearly, Respondent was responsible for seeing that Ms. Zarco possessed acceptable documentation of authorization for employment in the United States. Whether Respondent was required to act upon its suspicion that Ms. Zarco's documentation (which had passed INS muster) was premised on inaccurate information is not so clear. Counsel for the General Counsel argues Respondent bore no such responsibility, pointing out that INS regulations "expressly allow Employers to rely on documents which on their face appear to be valid and relate to the person for whom they are issued"⁵³ and that Ms. Elioff "never thought [Ms. Zarco's work permit] was a fake document." In short, Counsel for the General Counsel appears to assert that Respondent is not only justified in turning a blind eye to possible documentation fraud but that Respondent's failure to do so signals pretextuality. Respondent, on the other hand, contends that "[o]nce Maria Zarco...informed [Respondent] that she was not lawfully authorized to work in the United States, because she had 'fixed' her paperwork, it had no choice but to terminate her or allow her to resign." Respondent offers no authority for this broad assertion, and its legal validity may be questionable. However, given the statutory and case authority regarding an employer's burden of compliance under IRCA, I find it was not unreasonable for Ms. Elioff, and presumably Respondent's corporate counsel whom she consulted, to conclude the company might risk civil and/or criminal liability by retaining an employee who they believed had deceptively obtained work authorization.

⁵² Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 145 (U.S. 2002); see also *Collins Food International, Inc. v. U.S. Immigration & Naturalization Service*, 948 F.2d 549 (9th Cir. 1991) and *Mester Mfg. Co., v. I.N.S.*, 879 F.2d 561 (9th Cir. 1989).

⁵³ Citing Handbook for Employers Instructions for Completing Form I-9 (Employment Verification Form), p 8.

My finding that Respondent's concern with Ms. Zarco's immigration status was not so inconsequential as to constitute pretextuality does not, of course, end the inquiry. It remains to determine whether Respondent's suspension and termination of Ms. Zarco was motivated by
 5 validly held concerns or whether Respondent seized on suspected documentation improprieties to rid itself of an individual whose protected activity it disliked. As the Board, quoting *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981), noted, "the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *KOFY TV-20*, 332 NLRB 771, 772 (2000).

10 I have found that Ms. Elioff did not, as claimed, tell Ms. Zarco on January 13 that people who helped Guadalupe were going to end up in trouble. A direct threat is not, of course, the only method of proving that adverse employment action is unlawful. The timing of Ms. Elioff's meeting with Ms. Zarco, coming as it did almost immediately after Mr. Magana, in the presence
 15 of Manuel Arteaga, questioned Ms. Zarco about whether she would support Guadalupe Arteaga, creates at least a remote suspicion that Respondent's ensuing suspension and termination of Ms. Zarco was unlawfully motivated. However, a number of facts militate against such a conclusion. First, there is no evidence anyone reported to Ms. Elioff the substance of Mr. Magana and Manuel Arteaga's conversation with Ms. Zarco, and Ms. Zarco gave Ms. Elioff
 20 no indication she planned to write a letter for Guadalupe. Second, there is no evidence that Respondent bore animosity toward employee support of Guadalupe. Third, there is no evidence that Ms. Elioff deviated from normal practice in reviewing Ms. Zarco's work documentation. While Ms. Dominguez may have, inadvertently or otherwise, overlooked a discrepancy between the country of origin identified on Ms. Zarco's work permit and the one
 25 tacitly acknowledged in the workplace, there is no showing Ms. Elioff ever did so. Fourth, there is no evidence Ms. Elioff ever accommodated or overlooked any work permit inconsistency, so as to permit an inference that she treated Ms. Zarco disparately. Fifth, Ms. Elioff gave Ms. Zarco ample time to rectify any misunderstanding about her work permit or to verify its accuracy, which is inconsistent with a "rush to judgment" that can herald animus.⁵⁴

30 Upon Ms. Elioff's inquiry into the accuracy of her work permit, Ms. Zarco did little to alleviate Ms. Elioff's concerns. The General Counsel argues, essentially, that Respondent's failure to take steps to ascertain the accuracy of Ms. Zarco's work permit demonstrates animus.⁵⁵ I cannot agree. Respondent had no duty to establish the validity of Ms. Zarco's work
 35 permit; that burden, as well as access to authenticating information, belonged to Ms. Zarco. Since Ms. Zarco knew Ms. Elioff doubted Guatemala was her country of origin, it is reasonable to expect Ms. Zarco would have explored the issue with Ms. Elioff immediately or at least defended the veracity of the permit if she believed it to be accurate. Ms. Elioff gave Ms. Zarco a week to straighten out the perceived "error" in her work permit. There was nothing to prevent
 40 Ms. Zarco from presenting substantiating evidence to Ms. Elioff to establish that no error existed in the work permit. Ms. Zarco did not do so. Rather she obtained a letter from Mr. Salas that did not address the accuracy of the information. Even after Ms. Elioff declined to accept Mr. Salas' letter as resolving the problem, she gave Ms. Zarco additional time to resolve the problem, which Ms. Zarco did not utilize. Ms. Zarco's unresponsiveness in the face of a patent
 45 threat to her employment could rationally be viewed by Respondent as confirmation that a problem with the work permit existed. In light of Respondent's reasonable belief that the

⁵⁴ See *Caesar's Atlantic City*, 344 NLRB No. 122 (2005).

⁵⁵ Actions the General Counsel suggests Respondent should have taken include contacting
 50 the BCIS, asking Ms. Zarco for documents such as birth certificate or passport, and inquiring into family relationships.

integrity of Ms. Zarco's documentation was compromised, it is irrelevant that, as Counsel for the General Counsel points out, Ms. Zarco's 10-year performance record is unblemished. While such evidence may counterbalance alleged misconduct, it is unavailing as a defense to improper alien work authorization documentation.

In sum, the evidence compels a conclusion that Respondent suspended and thereafter terminated Ms. Zarco because of perceived inaccuracy in her work permit and not because she engaged in concerted, protected activity.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by
 - (a) interrogating employees about their or other employees' concerted, protected activities.
 - (b) asking employees to report to management the concerted, protected activities of other employees.
 - (c) creating the impression of surveillance of employees' union activities.
 - (d) impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
 - (e) equating voting for the Union with disloyalty to Respondent.
 - (f) warning an employee not to invite other employees to a union meeting.
 - (g) attributing possible outsourcing of work to employees' union or other concerted, protected activities.
 - (h) impliedly promising to continue a flexible discipline policy if employees reject the Union.
 - (i) Impliedly threatening employees with a strict discipline policy if employees select the Union.
4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁶

5 **ORDER**

Respondent, Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains, its officers, agents, successors, and assigns, shall

- 10 1. Cease and desist from
- (a)interrogating employees about their or other employees' concerted, protected activities.
 - 15 (b)asking employees to report to management the concerted, protected activities of other employees.
 - (c)creating the impression of surveillance of employees' union activities.
 - (d)impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
 - 20 (e)equating voting for the Union with disloyalty to Respondent.
 - (f) warning any employee not to invite other employees to a union meeting.
 - (g)attributing the reason for possible outsourcing of work to employees' union or other concerted, protected activities.
 - 25 (h)impliedly promising to continue a flexible discipline policy if employees reject the Union.
 - (i) impliedly threatening employees with a strict discipline policy if employees select the Union.
 - 30
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a)Within 14 days after service by the Region, post at its plant in Vernon, California, copies of the attached notice marked "Appendix."⁵⁷ Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the
 - 35
 - 40

45 ⁵⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

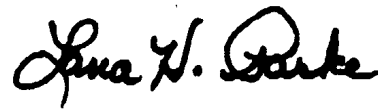
50 ⁵⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, California, July 29, 2005.



Lana H. Parke
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT ask any of you about your or other employees' activities on behalf of Freight, Parcel, Bakery, Dairy, Meat, Poultry And Factory Workers in the Los Angeles Metropolitan Area; General Truck Drivers, Warehousemen and Helpers Los Angeles, San Bernardino, Riverside Counties, California; Agricultural And Related Product Workers in the California Counties of San Diego, Imperial, Orange, Alameda, Los Angeles, San Bernardino, Ventura, Santa Barbara, Kern, San Luis Obispo, Tulare, Kings, Monterey, San Benito, Fresno And Merced, Local 63, International Brotherhood of Teamsters, AFL-CIO (the Union) or any other concerted, protected activities.

WE WILL NOT ask you to report to management about the union or other concerted, protected activities of other employees.

WE WILL NOT say anything to make you think we are watching your union or other concerted, protected activities.

WE WILL NOT say anything to make you think we are threatening you with reprisals if you engage in union or other protected activities.

WE WILL NOT say anything to imply you are disloyal to the company by supporting the Union or by engaging in any other concerted, protected activities.

WE WILL NOT warn you not to invite other employees to a union meeting.

WE WILL NOT say anything to make you think we will outsource work because of your union or other concerted, protected activities.

WE WILL NOT impliedly promise to continue a flexible discipline policy if you reject the Union.

WE WILL NOT impliedly threaten you with a strict discipline policy if you select the Union.

Sara Lee bakery Group d/b/a International Baking
Company and Earthgrains

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SARA LEE d/b/a INTERNATIONAL BAKING
COMPANY AND EARTHGRAINS

and

Cases 21-CA-36154
21-CA-36155
21-CA-36491

FREIGHT, PARCEL, BAKERY, DAIRY, MEAT,
POULTRY AND FACTORY WORKERS IN THE
LOS ANGELES METROPOLITAN AREA; GENERAL
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS
LOS ANGELES, SAN BERNARDINO, RIVERSIDE
COUNTIES, CALIFORNIA; AGRICULTURAL AND
RELATED PRODUCT WORKERS IN THE CALIFORNIA
COUNTIES OF SAN DIEGO, IMPERIAL, ORANGE,
ALAMEDA, LOS ANGELES, SAN BERNARDINO,
VENTURA, SANTA BARBARA, KERN, SAN LUIS
OBISPO, TULARE, KINGS, MONTEREY, SAN BENITO,
FRESNO AND MERCED, LOCAL 63, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

21-CA-36180

BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS INTERNATIONAL
UNION, LOCAL 37, AFL-CIO, CLC

and

21-CA-36201

MARTIN SANCHEZ

DECISION

Lana H. Parke, Administrative Law Judge

Table of Contents

DECISION	2
I. Statement of the Case	2
II. Issues	2
III. Jurisdiction.....	3
IV. Findings of Fact.....	3
A. Alleged Independent Violations of Section 8(a)(1) of the Act.....	3
1. Rigoberto Arteaga (aka Arturo Arteaga and herein Arturo Arteaga or Arturo), shipping and receiving supervisor	3
2. Sara Dominguez (Ms. Dominguez), Respondent's Human Resources Supervisor	4
3. Manuel Arteaga, Shipping and Receiving Supervisor and brother of Arturo Arteaga	4
4. Jesse Medina, (Mr. Medina), Logistics Manager	5
5. Rick Medina, Safety Director	6
6. Irma Elioff	6
7. Respondent's pre-election meetings with drivers	6
B. Suspension and Termination of Guadalupe Arteaga	8
C. Warning and Suspension of Felipe Serrano	12
D. Suspension and Termination of Maria Zarco	13
V. Discussion.....	17
A. Independent Violations of Section 8(a)(1) of the Act.....	17
1. Legal Principles	17
2. Supervisory conduct.....	18
B. Suspension and Termination of Guadalupe Arteaga	21
C. Warning and Suspension of Felipe Serrano	24
D. Suspension and Termination of Maria Zarco	27
Conclusions of Law	31
Remedy	31
ORDER.....	32
APPENDIX	34